BEFORE THE
ILLINOIS COMMERCE COMMISSION

In the Matter of	)	
	)	
LEVEL 3 COMMUNICATIONS, LLC	)	
	)	
Petition For Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois	)	Docket No. 00-0332

LEVEL 3 COMMUNICATIONS, LLC'S REPLY TO THE BRIEFS ON EXCEPTIONS TO THE HEARING EXAMINERS' PROPOSED ARBITRATION AWARD

****** Proprietary and Confidential Version ******

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TABLE OF CONTENTS

Page

INTRODUCTION

Level 3 Communications, LLC ("Level 3"), by its undersigned attorneys, respectfully submits this Reply to the Briefs on Exceptions to the Hearing Examiners' Proposed Arbitration Decision dated August 7, 2000 ("HEPO" or "HEPAD"), filed by Illinois Bell Telephone Company ("Ameritech Illinois") and the Staff of the Illinois Commerce Commission ("Staff").

ARGUMENT

ISSUE 1a: Reciprocal Compensation

Ameritech takes exception with the HEPO's general ruling that ISP-bound traffic is eligible for reciprocal compensation.[1] Ameritech provides nothing new to the argument it has made repeatedly on this issue, and this issue has been considered and resolved many times already – most recently only a matter of months ago in Docket 00-0027 (the Focal arbitration).[2] As the HEPO noted, "there is not anything on this record that would change the Commission's opinion [on this issue] at this time."[3] Indeed, even Ameritech witness Panfil acknowledged that the alternative phase-down and capped compensation proposals that were put forth by Ameritech in this docket, and in the Focal arbitration as well, could be considered "arbitrary" and "obviously not cost-based."[4] Ameritech's effort in the exceptions brief to have these admittedly arbitrary proposals adopted upon reconsideration should be rejected yet again.

Ameritech also reasserts the argument it made in its Post-Hearing Brief that the Commission must determine Level 3's costs to terminate traffic in order to set a reciprocal compensation rate that Ameritech must pay. Ameritech simply disagrees with the conclusion in the HEPO without explaining how the Hearing Examiners erred. Moreover, while Ameritech

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1 Ameritech Brief on Exceptions at 1-5.

2 *Focal Communications Corp. of Illinois*, Docket No. 00-0027(Ill. Com. Comm'n May 8, 2000) ("Focal Arbitration").

3 HEPO at 3.

4 Panfil Cross-Ex., Tr. at 491:9-11 (July 17, 2000).

points to Section 252 of the Telecommunications Act of 1996 in support of its argument, Ameritech never addresses the fact that the Hearing Examiners determined, based at least in part upon numerous Commission decisions in which Ameritech participated, that ISP-bound traffic is local traffic.[5] As such, under Section 252 as interpreted by the Federal Communications Commission ("FCC"), the incumbent's costs are the relevant measure in determining what reciprocal compensation rates for local traffic termination should apply symmetrically to both carriers.[6] This issue has been briefed thoroughly in this docket and resolved numerous times with a finding that this traffic should be treated as local, and the Commission is in the process of opening a generic proceeding to consider issues of reciprocal compensation for ISP-bound traffic. Accordingly, there is no reason to alter the HEPO's resolution of this issue.

ISSUE 1b: <u>Eligibility for Tandem Compensation</u>

Ameritech takes exception with the HEPO's ruling that deferred resolution of this issue to the generic proceeding on reciprocal compensation.[7] Level 3 agrees that the issue can be resolved now, and need not be deferred to the generic proceeding. Ameritech has apparently modified its proposal regarding the contract language on this issue, and the parties do not appear to be very far apart in their positions. Both Level 3 and Ameritech agree that Level 3 should qualify for tandem compensation if it meets the criteria regarding geographic coverage set forth in Section 51.711 of the FCC's rules. Ameritech would like to add additional language to ensure that Section 51.711 is applied consistently with Paragraph 1090 of the FCC's Local Competition Order.[8] The additional language requested by Ameritech is not necessary. As long as Section 51.711 provides the criteria to consider if and when Level 3 makes a claim for compensation at

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5 HEPO at 3.

6 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. Aug. 8, 1996), at ¶ 1089.

7 Ameritech Brief on Exceptions at 5-7.

8 Ameritech Brief on Exceptions at 6.

the tandem switching rate, Ameritech may argue at that time whether Level 3's network satisfies Section 51.711 or any other provisions it thinks are applicable to the issue. To the extent that Ameritech is seeking to impose a "functionality" test in addition to a "geographic coverage" test to the criteria, that issue was considered to be unnecessary in the Focal arbitration, and it is not necessary to resolve the issue in this proceeding. Therefore, Level 3 reasserts its proposal, with which Ameritech appears to be largely in agreement, that the following language should be adopted: "'Tandem Office Switch' or 'Tandem(s)' is a switching entity that has billing and recording capabilities and is used to aggregate traffic and to deliver traffic to carrier's aggregation points, points of termination, or points of presence, and to provide Switched Exchange Services. Level 3's switch will be classified as a Tandem Switch if it meets the requirements of 47 C.F.R. § 51.711(a)(3). A Tandem Switch does not include a PBX." In the alternative, Level 3 proposes that the following language be adopted in its interconnection agreement with Ameritech: "Level 3 will be entitled to receive terminating compensation at the Tandem Switch rate pursuant to applicable state and federal law." This should assuage any concerns on the part of Ameritech with respect to what provisions of law will govern whether Level 3 is eligible for tandem compensation.

ISSUE 2: <u>Deployment of NXX Codes</u>

Ameritech also takes exception with the HEPO's resolution of Issue 2 where the Hearing Examiners ruled that "AI's proposal is ill-defined and cannot be included in the agreement."[9] In particular, Ameritech takes exception with the Hearing Examiners' decision not to require Level 3 to compensate Ameritech for transport and switching up to the point of interconnection between Level 3 and Ameritech for purported foreign exchange ("FX") traffic. Although

Ameritech's argument is baseless – its proposal is too poorly defined to be included in the agreement, and its exceptions brief offers no substance to the proposal[10] – Ameritech's concern on this issue is largely resolved by a conclusion elsewhere in the HEPO with respect to Issue 27, regarding Points of Interconnection ("POIs").

Under Issue 27, the HEPO requires Level 3 to establish additional points of interconnection at an Ameritech tandem switch when the volume of Level 3 traffic at that tandem switch reaches the equivalent of an OC-12. Level 3 must deploy its own facilities or establish its own transport arrangements to transport traffic to or from local calling areas that reach the specified volume threshold. Therefore, Ameritech's concern that it must provide uncompensated transport to Level 3 when Level 3 uses virtual NXX arrangements has been substantially addressed. The HEPO concurs with this view: "The installation of POI's effects other issues in this and future arbitrations. With a POI installed in a tandem, the issue of the cost of regular and virtual NXX numbers transport all but disappears."[11] Therefore, Ameritech's exceptions to this Issue are baseless.

Indeed, a key regulatory issue presented by both Issues 2 and 27 is how much transport should the ILEC be reasonably expected to incur in order to exchange traffic with a CLEC, and at what point should the CLEC bear that burden of transport. The HEPO resolution of Issue 27 sets that threshold at the level of OC-12 facilities. Therefore, whenever the CLEC-bound traffic served by a particular Ameritech tandem switch reaches the threshold of an OC-12 facility, Level

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9 HEPO at 8.

10 *See* Level 3 Post-Hearing Brief at 34-35 (explaining that Ameritech wishes to be compensated at unspecified rates for unidentified facilities through its contract language in Appendices FX and FGA). Ameritech has also failed to explain how the parties would apply this compensation mechanism – would it require looking at facilities used on a call-by-call basis, or would an average rate be used? If a call-by-call approach is to be used, how would the parties identify the rate elements for purposes of billing? If an average is to be used, how would that average be calculated? Without providing answers to such essential practical questions, Ameritech cannot be said to have adequately explained and justified its proposal.

11 HEPO at 24.

3 must interconnect with Ameritech at that tandem switch. This requirement eliminates the need for Ameritech to provide tandem-to-tandem transport above the level of an OC-12 facility. Ameritech must incur the cost of transport to Level 3's nearest point of interconnection up to the level of an OC-12 facility. In short, the "free ride" problem alleged by Ameritech is a fantasy. The reasonable level of transport that Ameritech must provide in order to exchange traffic with Level 3 is resolved in Issue 27. If the Hearing Examiners were to substantially find that Ameritech should be compensated for the cost of facilities used in originating calls to Level 3, this would eviscerate the finding in Issue 27 as to where the POIs should be, since the POI(s) would no longer represent the network demarcation point where each party's responsibility begins and ends.

Ameritech's concerns and arguments are the product of a monopoly provider environment. It is important to understand how local exchange service may be provided in a competitive environment as opposed to a monopoly environment. In a monopoly environment, there is only one network provider, and it alone determines how to route traffic between endpoints. For this reason, if two Ameritech end users subtend the same end office, a call made between them would never travel beyond that single end office. A call between end users subtending separate end offices, however, would have to travel from one end office to another in order to be completed. If traffic between those end offices is not of a sufficient volume to justify direct trunking between the end offices, the call would have to travel to the local exchange carrier's tandem switch in order to be completed. Either that tandem switch would be connected to both end offices, or it would be connected to a second tandem switch serving the end office not served by the first tandem switch. This architecture can be considered "hub and spoke" with the tandem switches serving as hubs with the end offices on the rim at the end of the spokes.

Ameritech's description of FX service is likewise written from an incumbent perspective in a single network environment. In this environment, according to Ameritech, the difference between traditional local service and the FX service it provides is that the FX service subscriber pays to have a local telephone number in a foreign exchange, and also compensates Ameritech for the additional cost of transport to carry that traffic from the foreign exchange to the subscriber's home exchange.[12] In other words, the service requested by the FX subscriber permits Ameritech to bill additional transport charges because the service requires transport not typically provided in order to complete a local call in a monopoly environment. Under Ameritech's FX service, the call made by an end user to the FX subscriber is a local call to that end user and toll charges are not imposed. The transport elements of the FX arrangement not compensated by the end user are compensated by the FX subscriber.

In a competitive environment, however, *all* calls between end users served by competing carriers must travel between at least two switches – the incumbent local exchange carrier ("ILEC") switch serving the ILEC end user and the competitive local exchange carrier ("CLEC") switch serving the CLEC end user. For this reason, some inter-switch transport is always involved, regardless of the location of the end users. To minimize initial deployment of facilities, CLECs generally interconnect with the ILECs' hub and spoke architecture by establishing a point of interconnection at the hub – the tandem switch. Just as the ILEC incurs the cost of transport up to the tandem switch to complete an interoffice call, it incurs the cost of transport up to the tandem switch to complete an ILEC-to-CLEC call.

In some cases, the transport provided by the ILEC to exchange traffic with a CLEC may be transport between exchanges. That is a natural consequence of competitive interconnection. While a CLEC may locate its switch in Local Calling Area A, and interconnect with the ILEC at

[12] Ameritech Post-Hearing Brief at 13.

the nearest tandem switch in Local Calling Area A, that arrangement does not prevent the CLEC from serving customers in Local Calling Area B adjacent to Local Calling Area A from the same switch. A call from an ILEC customer in Local Calling Area B to a CLEC customer in Local Calling Area B would have to pass through the CLEC's switch located in Local Calling Area A after being exchanged at the point of interconnection at the tandem in Local Calling A. Further, if Local Calling Area A and Local Calling Area B are served by different ILEC tandem switches, the ILEC may be required to provide tandem-to-tandem transport in order to bring traffic to the CLEC point of interconnection in Local Calling Area A. In a monopoly environment, the ILEC would not typically provide transport from Local Calling Area B through Local Calling Area A and back to Local Calling Area B to complete the call. That transport, however, would be required in a competitive environment simply because competitive providers are not going to mirror Ameritech and deploy the ubiquitous network that Ameritech has over one hundred years. Thus, Ameritech often incurs additional transport in a competitive environment that it would not typically incur in a monopoly environment, regardless of customer location.

In the context of FX traffic provided in a competitive environment, there is no additional transport incurred by Ameritech because it would have had to incur some transport anyway to bring the traffic to the point of interconnection with the CLEC. Specifically, as Level 3 witness Gates explained, Ameritech is responsible for taking a call originated by one of its customers to the POI, and Level 3 is then responsible for taking the call to its customer on the other side of the POI, no matter where that customer is located.[13] Given that the POI is a fixed point, Ameritech's responsibility will not differ by customer location, and it cannot be said that Ameritech is entitled

[13] Gates Verified Statement at 30-32; Gates Cross-Ex., Tr. at 177:2-10, 186:16-187:12 (July 14, 2000); Gates Cross-Ex., Tr. at 229:3-21 (July 14, 2000).

to any additional compensation for originating a call just because of where the customer physically sits on Level 3's side of the POI. With the determination that Level 3 is justified in establishing additional POIs only when the traffic reaches an OC-12 threshold, Ameritech should not then be allowed to impose charges on Level 3 for taking certain traffic to the established POI(s).

The FCC has recognized that, in a competitive environment with many carriers, the originating carrier is responsible for transport up to the POI with the terminating carrier. In the recent *TSR Wireless, LLC v. U S West Communications, Inc.* decision, the FCC explained the "rules of the road" for the exchange of traffic between carriers:

> The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. *In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call.* Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[14]

In the end, there is no reason to distinguish virtual NXX traffic from any other traffic in a multi-provider telecommunications market. No toll charges are lost because the end user is not billed toll rates by Ameritech to complete a virtual NXX call provided by Ameritech. The additional transport charge that Ameritech would receive in a monopoly environment is no longer earned by or owed to Ameritech because it is providing no transport in addition to the

[14] *TSR Wireless, LLC v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15 E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, (rel. Jun. 21, 2000) at ¶ 34 (emphasis added).

transport it is legally obligated to provide to interconnect with a CLEC for any other local call. Any additional transport provided to complete a call under a so-called FX or virtual NXX arrangement is provided by the CLEC, and the CLEC is compensated by the CLEC customer.[15] In light of how all "physical NXX" and "virtual NXX" calls are routed the same distance to the same POI by Ameritech, and in light of the vague nature of its contract proposals in this proceeding, the determination in the HEPO that Ameritech is not entitled to any compensation in originating calls to so-called FX or virtual NXX customers is justified and should be sustained in further rulings.

ISSUE 6: Term of the Agreement

By counter-proposing a two year term to Level 3's suggested three year term, and then having that recommended term adopted in the HEPO, Ameritech seems to suggest that is has in some way gone beyond its generic duty to negotiate in good faith under Section 251(c)(1) of the Act. Generally, Level 3 agrees that both sides in this proceeding have negotiated in good faith before and during arbitration to resolve many issues between them. In this case, however, even if it has negotiated in good faith, Ameritech has not truly offered a compromise position in that Level 3 has contested both a *one year* and a *two year term* from the outset as an insufficient amount of time in which to implement a business plan, deploy its network infrastructure and develop customer relationships.[16] Level 3 has stated all along that even a two year term would

[15] As for Ameritech's "free ride" idea, if anyone is getting a "free ride" when Level 3 serves a customer using a virtual NXX arrangement under the HEPO as drafted, it is Ameritech. Under the HEPO, Ameritech is not required to pay reciprocal compensation to Level 3 for virtual NXX traffic. Thus, Level 3 provides a transport and termination function for Ameritech and Ameritech's subscribers that goes uncompensated by Ameritech. As Level 3 explained in its Brief on Exceptions, the Hearing Examiners should defer resolution of the reciprocal compensation issues associated with virtual NXX traffic to the generic proceeding on reciprocal compensation for ISP-bound traffic. In the alternative, the Hearing Examiners should reverse their ruling in the HEPO and rule that reciprocal compensation is owed for virtual NXX traffic for the reasons given in Level 3's Brief on Exceptions.

[16] Level 3 Arbitration Petition at 14-5; Level 3 Post-Hearing Brief at 46-9.

be cost prohibitive in that the Parties face the prospect of having to commence negotiations on a successor agreement in only fifteen months.[17]

The Hearing Examiners should reject Ameritech's contentions and find, as the Texas Commission determined in the recent Southwestern Bell Telephone Company arbitration with MCI, and as Ameritech has itself acknowledged in the past in entering into other agreements of such duration,[18] that a three year term would be "an efficient use of all parties' resources."[19]

ISSUE 10: Third Party Intellectual Property Rights

1. Ameritech's proposal to obtain "commercially reasonable terms" for the CLEC is not the equivalent of what the FCC has required in its Third Party IP Ruling.

The Hearing Examiners have asked that Ameritech respond to Level 3's assertions - that Ameritech's proposal to obtain "commercially reasonable terms" for the CLEC is not the equivalent of the FCC's requirements that co-extensive rights be obtained on terms and conditions "equal in quality" and at the "lowest reasonable costs."[20] Ameritech responds by arguing that the phrase "commercially reasonable terms" "does nothing to diminish Ameritech's obligation to use its best efforts to obtain co-extensive rights for Level 3."[21] To the contrary, Ameritech's proposed language falls short of its full obligations, as established by the FCC, to protect Level 3 and other carriers. The FCC requires not only that the incumbent use its "best efforts" to obtain "co-extensive" rights, but that the rights also be "equal in quality," and at "the

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17 Level 3 Arbitration Petition at 14-5.

18 It appears from the material filed in the Focal Arbitration that Focal and Ameritech agreed to a three year term for their interconnection agreement without having to arbitrate the issue. Ameritech has still provided no basis to believe that there is some special reason why other CLECs are not entitled to a three year term.

19 *Petition of Southwestern Bell Telephone Company for Arbitration with MCI WorldCom Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Docket 21791, at 21 (Texas PUC, May 26, 2000 ("SWBT/MCI Arbitration").

20 HEPO at 14.

21 Ameritech Brief on Exceptions at 14.

lowest reasonable cost."[22] In focusing on how the "commercially reasonable" language relates to "best efforts," Ameritech has failed to provide any explanation as to how this term relates to the scope of rights that Ameritech must seek to obtain – whether it will seek only to obtain "commercially reasonable terms" or rights that "are equal in quality" and obtained at the "lowest reasonable cost" remains an open question. Ameritech's proposal to obtain "commercially reasonable terms" for the CLEC therefore falls short of what the FCC requires and the Ameritech language should be replaced with terms that more accurately reflect the scope of the FCC's order.

2. Ameritech also errs in its assertion that it need not obtain any additional rights necessary to allow Level 3 to use network elements in a different manner than Ameritech.

Ameritech also errs in its assertion that its proposal - that "[Ameritech Illinois] shall have no obligation to obtain for [Level 3] any Intellectual Property right(s) that would permit Level 3 to use any unbundled network elements in a different manner than used by [Ameritech Illinois]" - appropriately reflects what the FCC requires.[23] This proposal is inferior to, and narrower in scope than, the FCC's "co-extensive" requirement. By using the phrase "co-extensive," the FCC has obligated the incumbent LEC to provide precisely the same scope of rights that it has obtained from third party vendors, regardless of whether Ameritech actually uses all of those rights that it has obtained in its network at any given moment in time. By contrast, under Ameritech's proposal, Ameritech could actually limit CLECs to the subset of rights that it actually uses rather than providing the full panoply of rights afforded by its license. In such an instance, Level 3's protection from infringement claims would be limited to the extent of

[22] *Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate Licenses or Right-to-use Agreements Before Purchasing Unbundled Network Elements, Implementation of the Local Competition Provision in the Telecommunications Act of* 1996, Memorandum Opinion and Order, CC Docket No. 96-98, FCC 00-139 *at* ¶ 13 (rel. April 27, 2000) ("*Third Party IP Ruling*").

Ameritech's use of the IP rights in its network. Moreover, under such a scenario, Level 3 could be subject to infringement claims simply because it is not using UNEs in exactly the same manner as Ameritech, even though the underlying scope of Ameritech's IP rights would otherwise be broad enough to afford protection against such claims.

Indeed, the FCC clearly intends that the term "co-extensive" rights be interpreted to include the fill set of rights negotiated by the incumbent. In its *Third Party IP Ruling*, the FCC stated that it "expect[s] that in nearly all cases, requesting carriers will be able to access unbundled network elements without the need for additional licenses.[24] The FCC has also noted that key vendors have stated that "no additional licenses or fees should be required when a competing carrier obtains access to unbundled network elements under current contracts for a *use that is within the scope of the original license*."[25] Thus, consistent with the FCC's rulings, Ameritech should be required to offer to CLECs the full panoply of rights Ameritech has obtained from third party vendors. To rule otherwise would allow Ameritech to escape its obligations to provide non-discriminatory access to UNEs as required under Section 251(c)(3) of the Act.[26]

ISSUE 14: <u>Assignment</u>

1. Ameritech correctly observes that the HEPO failed to address all relevant issues.

Level 3 concurs with Ameritech's request insofar as it asks the Commission to address portions of the issue that the HEPO did not address.[27] As Level 3 stated in its Brief on Exceptions, the HEPO does not address: (1) Level 3's opposition to language in the Agreement that would restrict transfers to Level 3 affiliates who already have Agreements with Ameritech or

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23 Ameritech Brief on Exceptions at 14-5.
24 *Third Party IP Ruling at* ¶ 8.
25 *Id.* (emphasis added).
26 *Id. at* ¶ 2.

SBC affiliates; (2) Level 3's proposed deletion of language in Section 29.3 of the General Terms and Conditions which provides that Ameritech has no obligations to CLECs upon consummation of a sale or transfer of territory or exchanges to non-SBC affiliates; and (3) Level 3's proposal to delete language in Section 29.2 that would require the Parties to agree on name change charges before the Agreement can be transferred or assigned.

2. The Commission should clarify that the three unaddressed issues will be resolved in favor of Level 3.

Ameritech has objected to Level 3's proposed deletion of the restriction on transfers to Level 3 affiliates who already have Agreements of their own with Ameritech or SBC affiliates.[28] Ameritech is concerned that such a transfer would create confusion where a Level 3 affiliated assignee could be subject to two contracts with conflicting contractual terms.[29] Under Section 252(i) of the Act, Ameritech is required to make available any interconnection, service or network element to which it is a party on the same terms and conditions as provided for in the other agreement. Because under Section 252(i) Level 3 already has access to the terms of the affiliate's agreement, and vice versa, Level 3 fails to see how Ameritech would realistically be burdened under this scenario. Ameritech's proposal attempts to restrict Level 3's rights under the Act and should be rejected.

Ameritech has also contested Level 3's proposed deletion of language in Section 29.3 of the General Terms and Conditions, which provides that Ameritech has no obligation to CLECs upon consummation of a sale or transfer of territory or exchanges to non-SBC affiliates. What Level 3 seeks is some level of assurance that Level 3 end users will not be left without service by a new incumbent who refuses to honor the interconnection terms that previously allowed Level 3

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[27] Ameritech Brief on Exceptions at 15.

[28] Ameritech Post-Hearing Brief at 41-2.

to serve them. Level 3 does not ask that Ameritech be bound by the Agreement in perpetuity, but instead Ameritech should provide Level 3 with some level of assurance that the Agreement will be honored by an Ameritech successor or assign. The alternative would be to require Level 3 to negotiate new terms with the "new incumbent," which would leave uncertain Level 3's ability to serve its customers in the sold exchange in the interim.

Finally, Ameritech has challenged Level 3's proposal to delete language in Section 29.2 that would require the Parties to agree to name change charges before the Agreement can be transferred or assigned.[30] Ameritech observes that "unless the name change is completed on time, there could be serious billing and other problems in transitioning to the new CLEC."[31] The resolution of Ameritech's compensation for the name change should not impede the timing of an assignment or transfer, particularly in light of Ameritech's own assertions about billing and other problems involved in transitions. Ameritech's proposed contract language would require Level 3 to agree to unspecified individual case basis charges to implement the CLEC name change as a condition to receiving Ameritech's consent for the assignment or transfer.[32] Ameritech's proposal places an undue burden on Level 3 to concede to unspecified name change charges, is contrary to public policy, and should be rejected.

ISSUE 19: <u>Enhanced Extended Loops</u>

Ameritech takes exception to the HEPO's recommendation that ISP traffic is local exchange service for purposes of EEL certification.[33] For the purposes of determining whether a

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29 Ameritech Post-Hearing Brief at 42.

30 Ameritech Post-Hearing Brief at 42.

31 Ameritech Post-Hearing Brief at 42.

32 SBC 13-State Agreement, GT&C §§ 4.9, 29.2. Alternatively, as noted in Level 3's Brief on Exceptions, Ameritech appears to claim that the name change charges are already specified in its tariffs. While Level 3 objects to the tariffed charges for reasons set forth earlier in this proceeding, if the charges are in fact already specified in Ameritech tariffs, there should be no need for this provision requiring the parties to agree upon the extent of name change charges prior to an assignment.

33 Ameritech Brief on Exceptions at 16.

carrier is providing a "significant amount of local exchange service," the FCC has determined that "[t]raffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC."[34] Thus, ISP-bound traffic satisfies the local traffic requirement for the purposes of EEL certification because it is subject to the reciprocal compensation obligations in the State of Illinois under numerous Commission and court rulings.[35]

In its exception, Ameritech also attempts to draw a distinction between voice and data traffic for the purposes of calculating a significant amount of "local exchange traffic."[36] Ameritech attempts to draw this distinction despite specific results in its recent arbitration with Focal Communications Corporation of Illinois ("Focal")[37] and the finding yet again in the HEPO that ISP-bound traffic should be considered local. In the Focal arbitration, this Commission held that "for the purposes of complying with the FCC's directive in the Supplemental Order, Focal should be allowed to count ISP bound traffic as local exchange service in self certifying that it will be providing a significant level of local exchange service through an EEL." The HEPO's recommendation is consistent with the Commission's prior rulings and should be adopted.

ISSUE 27: <u>Points of Interconnection</u>

Less than two months ago, in the context of an application by an Ameritech affiliate to provide long distance service in Texas, the FCC stated that: "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically

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[34] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, n. 64 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

[35] *See e.g., Teleport v. Illinois Bell , et al.*, Docket No. 97-0404, 97-0519, 97-0525 Consolidated (Ill. Com. Comm'n Mar. 11, 1998), *aff'd, Illinois Bell Tel. Co v. WorldCom, Techs, Inc.* 1998 WL 419493 (N.D. Ill. 1998), *aff'd, Illinois Bell Tel. Co. v. WorldCom Tech., Inc.* 179 F.3d 566 (7th Cir. 1999).

[36] Ameritech Brief on Exceptions at 17-8.

[37] *Focal Arbitration* at 15.

feasible point. *This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.*"[38] This Commission has likewise previously upheld a CLEC's right to designate a single point of interconnection at the Wabash tandem.[39] Thus, the Hearing Examiners and the Commission should start from the premise that, absent any showing by Ameritech that a particular interconnection arrangement is not technically feasible, a single POI in each LATA is appropriate and consistent with governing law.

Ameritech has not shown that one POI per LATA, or Level 3's proposed alternative to one POI per LATA, is technically infeasible. In an effort to seek compromise, Level 3 alternatively proposed to depart from the single POI per LATA approach to interconnection, such that it would be required to establish additional POIs in each LATA once the traffic exchanged with respect to a given tandem serving area exceeded an OC-12 level over three consecutive months.[40] Ameritech's brief on exceptions does not argue that the OC-12 interconnection threshold recommended by Level 3 and adopted by the Hearing Examiners is not technically feasible, nor has Ameritech made a claim at any time during this proceeding that a particular threshold (even one POI per LATA) is not technically feasible. Rather, Ameritech concentrates its efforts in the exceptions brief on claims that the OC-12 level threshold adopted in the HEPO is too high given the average number of trunks associated with each of its tandems. Ameritech instead argues for an OC-3 threshold. Absent any such showing (or even argument) by Ameritech, the "technical feasibility" test set forth by the FCC requires that Ameritech's arguments in its exceptions brief be rejected. The Hearing Examiners should order the Parties to

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38 SWBT 271 application order, ¶ 78 (emphasis added).

39 *Illinois Bell Telephone Company (Ameritech Illinois) and MCIMetro Access Transmission Services, Inc. Proposed Arbitrated Agreement*, 97 AA-0002, Order 6-7 (April 28, 1997).

40 Gavalas Cross-Ex., Tr. at 125:5-11. The HEPO does not specify whether this OC-12 level is to be measured over three consecutive months before a new POI would be required, as was requested by Level 3. As part of subsequent rulings in this docket, the Hearing Examiners and the Commission should clarify that this level of traffic is in fact to be measured over a period of three consecutive months before an additional POI will be required.

incorporate the Level 3 alternative to one POI per LATA, an interconnection threshold of OC-12 over three consecutive months, in the contract.

Even if one were to assume that Ameritech's arguments as to the threshold volume could be given any weight under federal law, these arguments still should not prevail. As noted above, Ameritech's sole argument at this point appears to be that an OC-12 threshold for the establishment of additional POIs is inappropriate because of the average number of trunks located in its tandem serving areas today.[41] Beyond Ameritech's failure to address technical feasibility in any manner, this argument is inapposite for at least four additional reasons. First, Ameritech confuses the issue in its exceptions brief by looking at the average number of trunks in each tandem serving area rather than looking at the number of subscriber lines in each such area. While Ameritech argues that there are [***][***] trunks behind the average Ameritech tandem in Illinois, it fails to note that there are [***][***] subscriber lines on average located behind each tandem.[42] These subscriber lines represent the number of potential simultaneous calls that could be placed to Level 3 or any other carrier. If one doubles the 8,064 simultaneous calls that Level 3 might receive at an OC-12 level to calculate the number of potential calls to Level 3 customers over one hour,[43] and this total is then compared to the total number of lines at the average Ameritech tandem, the result is that the OC-12 represents only [***] [***] of the

[41] Ameritech Brief on Exceptions at 19-20.

[42] Note that the calculation based upon actual Ameritech data is significantly higher than the 200,000 to 300,000 lines average per tandem provided by Ameritech witness Mindell as a rough estimate at the hearing. Mindell Cross-Ex., Tr. at 387:6-12; 412:17-414:4 (July 17, 2000). The HEPO's reliance upon this figure (at p.24) in ruling that an OC-12 would be an appropriate threshold was therefore conservative and in fact generous to Ameritech.

[43] In examining the relative reasonableness of a DS-3 threshold and an OC-12 threshold, Mr. Mindell stated at the hearing that "a typical Internet conversation is a half hour," and then doubled his proposed 672 trunks to reflect the number of calls that Level 3 might receive from Ameritech over the course of an hour. Mindell Cross-Ex., Tr. at 414:10-18 and 416:2-5 (July 17, 2000). Level 3 has done the same here with 8,064 call paths to ensure consistency in analysis (doubling this total to 16,128), even though it still disputes Ameritech's contention that Internet calls do typically last roughly a half hour.

potential calls originating in that tandem serving area.[44] (If one adopts Ameritech's estimate in its exceptions brief that an OC-12 represents 10,608 calls per hour based upon a twenty-six minute Internet call, the OC-12 becomes an even smaller percentage of the total potential calls.[45]) Thus, the higher figure listed in Ameritech's exceptions brief is misleading and is based upon an "apples-to-oranges" comparison of trunking data rather than a consistent analysis of the subscriber line data as used at the hearing and then again in the HEPO.

The second flaw in Ameritech's reasoning is its assumption that the HEPO somehow intended to have the CLEC's threshold of traffic occupy 1/20th of a tandem's total traffic before an additional POI would be required.[46] As a preliminary matter, the calculations provided above demonstrate that even an OC-12 does not reach such a level based upon the actual number of subscriber lines at Ameritech's tandems. Thus, even if Ameritech's reasoning were correct and the intent was to reach some magic 5% number, the OC-12 threshold would have to be *increased significantly* to account for this magic number. It is more likely the case, however, that Ameritech is simply mistaken, and that there was no specific intent to somehow reach a 5% threshold. To begin with, there has been no discussion at all in this proceeding as to why a particular percentage (be it 5% or 15% or 35%) might be the perfect threshold, so to suddenly ascribe some intent to reach a 5% threshold to the Hearing Examiners is a leap unsupported by any record evidence. Moreover, the 5.7% figure cited in the HEPO and held up by Ameritech as

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[44] For the sake of clarity, the calculation is as follows: (1) each OC-12 represents 8,064 simultaneous call paths; (2) doubling the OC-12 to reflect the number of calls that could be made within an hour (again, assuming an average half hour call) results in 16,128 potential calls per hour; and (3) dividing this result by the average number of lines at each Ameritech tandem results in the foregoing percentage. It should also be pointed out that the HEPO's statement (at p. 24) that an OC-12 represents "about 12,000 calls" is incorrect – the number of simultaneous calls associated with an OC-12 is actually about 33% less than that, or 8,064. *Accord* Ameritech Brief on Exceptions at 19. In light of this overestimate of what constitutes an OC-12 and the fact that Ameritech's actual data shows a higher number of lines per tandem than the Mindell estimates at the hearing, the OC-12 level of traffic almost certainly represents an even lower percentage of traffic at the tandem than the estimates set forth in the HEPO.

[45] Ameritech Brief on Exceptions at 20.

[46] Ameritech Brief on Exceptions at 19.

evidence of some specific intent in fact comes directly from a calculation in the Level 3 Post-Hearing Brief.[47] Specifically, had Ameritech looked further at the record in this proceeding, it would have realized that this 5.7% figure is not the result of any specific intent to reach a 5% result, but instead represents the number of simultaneous call paths in an hour in a single OC-12 (16,128, assuming two half-hour long calls) as a percentage of 280,000 subscriber lines – the estimate of subscriber lines behind each tandem used by Mr. Mindell at the hearing in an attempt to demonstrate the reasonableness of Ameritech's proposal.[48] Level 3's Post-Hearing Brief lays out both the calculation of this 5.7% figure, as well as the calculation of the 0.5% figure also cited on page 24 of the HEPO. These figures therefore do not represent any implicit conclusion about CLEC traffic necessarily equating a specific desired percentage of a tandem's total traffic, but rather they represent the Hearing Examiners' efforts to look to evidence and arguments in the record in deciding upon an OC-12 threshold of traffic as reasonable.

The third flaw in Ameritech's logic is its failure to look at how a proposed DS-3 or OC-3 threshold would affect the parties where they are actually operating today. Ameritech's exceptions brief uses an average of *all tandems in Illinois* to argue that the OC-12 threshold is too high. Yet if one focuses upon the tandems *in LATA 358* – which is the only LATA where Level 3 operates today – an OC-12 threshold seems reasonable, and perhaps even too low. There are five Ameritech tandems in LATA 358; the average number of subscriber lines behind each of these tandems is [***] [***]. Using the same calculation as in the foregoing paragraph for consistency (including the unsupported doubling of the number of calls in an OC-12 per hour to reflect purported Internet traffic), this means that the OC-12 level would represent only [***] [***] of the potential calls originating in each tandem serving area. By contrast, a DS-3

[47] *See* Level 3 Post-Hearing Brief at 74.

threshold (as originally proposed by Ameritech) would represent only [***] [***], and an OC-3 threshold (which Ameritech now advocates) would constitute only [***] [***] of the potential callers in that tandem serving area. An OC-12 threshold is therefore reasonable – if not conservatively low – in light of the network architecture in LATA 358.

The final flaw in Ameritech's argument is related to the problem discussed immediately above. Ameritech's use of averages to critique the result in the HEPO is misplaced. Indeed, it is generally inappropriate to use averages as the basis for arguments or decisions in the interconnection planning context. As Level 3 witness Gavalas stated, the development of an interconnection process is best left to the network planners for resolution on a case-by-case basis, rather than leaving network decisions to be resolved conclusively through overarching points made in briefs and orders. Ms. Gavalas explained that there are many factors that go into determining when and how to interconnect, and traffic volume is just one of those factors.[49] For this reason, consistent with governing federal law, Level 3 proposed that only a single POI per LATA be required initially. Then, as all of the factors identified by Ms. Gavalas (including traffic volume) warranted, the parties' planners – not their attorneys – could make the determination when and how to bring up an additional POI.

That being said, in an effort to broker a compromise, Level 3 agreed that it might give desired certainty to both parties to have a specified "trigger" in the contract as to when additional POIs would be required. (Even though, as Ameritech witness Mindell acknowledged, Level 3 has established additional POIs with Ameritech affiliates where individual circumstances warranted.[50]) Still, the use of any hard and fast threshold could lead to undesirable results in a

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[48] Mindell Cross-Ex., Tr at 415:16-21; *see also* Level 3 Post-Hearing Brief at 74.

[49] Gavalas Verified Statement at 5; Gavalas Cross-Ex., Tr. at 89:5-15 (July 14, 2000).

[50] Mindell Cross Ex., Tr. at 386:3-11 (July 17, 2000). *See also* Gavalas Cross-Ex., Tr. at 121:5-16 (July 14, 2000).

particular case. A given traffic threshold may appear much too small at one tandem, while appearing significant at another tandem. For example, using an OC-12 as the threshold at the NBRKILNT Ameritech tandem in LATA 358 would result in the need for an additional POI there whenever the calls coming to Level 3 represent only [***] [***] of the potential callers behind that tandem. Thus, using averages in the manner Ameritech does only obscures the relative benefits and detriments of any given threshold. Given where the parties actually operate and interconnect in Illinois, an OC-12 threshold may in fact be too small. Level 3 therefore continues to assert that a single POI per LATA approach, with the parties to develop additional POIs as specific circumstances dictate, is the most appropriate result from both a legal and engineering perspective. Nonetheless, if a single threshold is going to be utilized in Illinois for interconnection for certainty purposes and a case-by-case analysis will not be employed, the OC-12 threshold over three consecutive months represents the most reasonable option for the reasons explained in the briefs of Level 3 and Staff, and for the reasons identified in the HEPO.

ISSUE 34: Indemnity

Level 3 commends the HEPO insofar as it clarifies that the indemnity provisions contained in Section 14 of the General Terms of the Agreement provide adequate protection to Ameritech for any foreseeable loss. As Level 3 has maintained, the indemnity provisions Ameritech seeks to include in Appendix OSS Resale & UNE are unreasonably broad and should be deleted. The HEPO correctly concludes that Level 3 should not be required to indemnify Ameritech for loss or damage caused by the actions of third parties.[51] The HEPO's recommendation is proper and should be adopted.

[51] HEPO at 27.

CONCLUSION

For the reasons set forth above, Level 3 respectfully urges the Commission to enter an Arbitration Award consistent with the foregoing.

Respectfully Submitted,

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Dated: August 14, 2000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 14, 2000, he has caused copies of Level 3 Communications, LLC's Reply to the Briefs on Exceptions to the Hearing Examiners' Proposed Arbitration Award in Docket 00-0332 to be served on each of the persons listed below electronically and/or via overnight mail:

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